

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
NO. 09563

COMMONWEALTH

vs.

SEAN DWYER.

ORDER

In our opinion released today in this case, the court announced a new protocol for use in criminal cases where a defendant seeks pretrial inspection of statutorily privileged records of third parties. The protocol is set forth in the Appendix to the opinion and is attached hereto. In accordance with footnote 27 of the opinion, the court hereby approves the following model notices and orders for use in these cases:

1. COMMONWEALTH'S NOTICE ACCOMPANYING SUMMONS TO RECORD HOLDER AND THIRD-PARTY SUBJECT OF HEARING ON DEFENDANT'S MOTION UNDER RULE 17 (A) (2) OF THE MASSACHUSETTS RULES OF CRIMINAL PROCEDURE, 378 MASS. 885 (1979);
2. NOTICE ACCOMPANYING SUMMONS TO KEEPER OF RECORDS (for records not presumptively privileged or as to which privilege has been waived);
3. NOTICE ACCOMPANYING SUMMONS TO KEEPER OF RECORDS (for presumptively privileged records);
4. PROTECTIVE ORDER FOR DEFENSE COUNSEL;
5. ORDER ALLOWING ACCESS TO PRIVILEGED RECORDS BY PERSONS OTHER THAN DEFENSE COUNSEL.

Copies of the model notices and orders are also attached hereto. These may be amended by the court from time to time, on recommendation of the Standing Advisory Committee on the Rules of Criminal Procedure or otherwise.

By the Court,

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Susan Mellen, Clerk

Entered: December 29, 2006.

APPENDIX.

1. Filing and service of a motion pursuant to Mass. R. Crim. P. 17 (a) (2), 378 Mass. 885 (1979). (a) Whenever in a criminal case a defendant seeks to summons "books, papers, documents, or other objects" (records) from any nonparty individual or entity prior to trial, the defendant shall file a motion pursuant to Mass R. Crim. P. 17 (a) (2), stating the name and address of the custodian of the records (record holder); the name, if any, of the person who is the subject of the records (third-party subject), for example a complainant; and describing, as precisely as possible, the records sought. The motion shall be accompanied by an affidavit as required by Mass. R. Crim. P. 13 (a) (2), as appearing in 442 Mass. 1516 (2004), and Commonwealth v. Lampron, 441 Mass. 265 (2004) (Lampron).

(b) The defendant shall serve the motion and affidavit on all parties. Cf. Commonwealth v. Mitchell, 444 Mass. 786, 800 (2005) (describing "extraordinary circumstances" in which rule 17 (a) (2) process may proceed ex parte).

(c) The Commonwealth shall forward copies of the motion and affidavit to the record holder and (where applicable) to the third-party subject, and notify them of the date and place of the hearing on the motion. See Lampron, supra at 270-271. The Commonwealth shall also inform the record holder and third-party subject that (i) the Lampron hearing shall proceed even if either

is absent; (ii) the hearing shall be the third-party subject's only opportunity to address the court; (iii) any statutory privilege applicable to the records sought shall remain in effect unless and until the third-party subject affirmatively waives any such privilege, and that failure to attend the hearing shall not constitute a waiver of any such privilege; and (iv) if the third-party subject is the victim in the case, he or she has the opportunity to confer with the prosecutor prior to the hearing. See G. L. c. 258B, § 3 (g).<sup>1</sup>

2. The Lampron hearing and findings. (a) At the Lampron hearing, the judge shall hear from all parties, the record holder, and the third-party subject, if present.<sup>2</sup> The record holder and third-party subject shall be heard on whether the records sought are relevant or statutorily privileged.

(b) Following the Lampron hearing, the judge shall make oral or written findings with respect to the records sought from each record holder: (1) that the defendant seeking the records has or has not satisfied the requirements of rule 17 (a) (2), as explicated in Lampron, supra at 269, and Commonwealth v. Dwyer,

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<sup>1</sup> The Supreme Judicial Court today has issued an order containing model notices and orders for use in criminal cases where a defendant seeks pretrial inspection of statutory privileged records of a third party, for example, a model notice for the Commonwealth to use in its communications with the record holder and third-party subject.

<sup>2</sup> The Commonwealth's inability to locate either the record holder or the third-party subject shall not delay the Lampron hearing.

ante (2006) (Dwyer); and (2) that the records sought are or are not presumptively privileged. Presumptively privileged records are those prepared in circumstances suggesting that some or all of the records sought are likely protected by a statutory privilege, for example, a record prepared by one who holds himself or herself out as a psychotherapist, see G. L. c. 233, § 20B; a social worker, see G. L. c. 112, § 135B; a sexual assault counsellor, see G. L. c. 233, § 20J; or a domestic violence victims' counsellor, see G. L. c. 233, § 20K.<sup>3</sup> A judge's determination that any records sought are presumptively privileged shall not be appealable as an interlocutory matter, and shall carry no weight in any subsequent challenge that a record is in fact not privileged.

3. Summons and notice to record holder. If all rule 17 (a) (2) requirements have been met and there has been no finding that the records sought are presumptively privileged or the third-party subject has waived all applicable statutory privileges, the judge shall order a summons and notice to issue directing the record holder to produce all responsive records to the applicable clerk of the court on the return date stated in

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<sup>3</sup> Not having reviewed any of the records sought, the judge shall make such determination based on the identity of the record holder or record preparer (if known) and any additional information adduced at the Lampron hearing. The defendant shall have the burden of showing that records are not presumptively privileged.

the summons.<sup>4</sup> The clerk shall maintain the records in a location separate from the court file, and the records shall be made available for inspection by counsel, as provided in paragraph 4 (a), infra. The records shall not be made available for public inspection unless and until any record is filed in connection with a proceeding in the case or introduced in evidence at the trial.<sup>5</sup>

Where a judge has determined that some or all of the requested records are presumptively privileged, the summons and notice shall so inform the record holder, and shall order the record holder to produce such records to the clerk of the court in a sealed envelope or box marked "PRIVILEGED," with the name of the record holder, the case name and docket number, and the return date specified on the summons.<sup>6</sup> The clerk shall maintain the records in a location separate from the court file, clearly

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<sup>4</sup> See note 1 of Appendix, supra, concerning a model notice to accompany the summons.

<sup>5</sup> Some records, although not presumptively privileged, may contain information of a personal or confidential nature, such as medical or school records. See, e.g., G. L. c. 71B, § 3 (special education records); G. L. c. 111, §§ 70, 70E (hospital records). The judge may, in his or her discretion, order such records produced subject to an appropriate protective order. See, e.g., paragraph 4 (b), infra. See also Commonwealth v. Mitchell, 444 Mass. 786, 800 (2005) (cautioning that "no inspection of summonsed documents, by either side, shall be allowed until after a full consideration of any privileges, privacy concerns, or other legitimate interests brought to the judge's attention in timely fashion").

<sup>6</sup> See note 1 of Appendix, supra, concerning a model notice to accompany the summons.

designated "presumptively privileged records," and the records shall not be available for inspection except by counsel as provided in paragraph 4 (b), infra. The records shall not be made available for public inspection unless and until any record is introduced in evidence at trial.

4. Inspection of records. (a) Nonpresumptively privileged records. The clerk of court shall permit defense counsel who obtained the summons to inspect and copy all records that are not presumptively privileged. The Commonwealth's ability to inspect or copy the records is within a judge's discretion. Cf. Commonwealth v. Mitchell, 444 Mass. 786, 800 (2005) (also noting that defendant may have production obligations pursuant to Mass. R. Crim. P. 14, as appearing in 442 Mass. 1518 [2004], or other pretrial agreements).<sup>7</sup>

(b) Presumptively privileged records. The clerk of court shall permit only defense counsel who obtained the summons to inspect the records, and only on counsel's signing and filing a protective order in a form approved by this court.<sup>8</sup> The protective order shall provide that any violation of its terms and conditions shall be reported to the Board of Bar Overseers by anyone aware of such violation.

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<sup>7</sup> The Commonwealth may inspect or copy any records if prior consent is given by the record holder and third-party subject (where applicable).

<sup>8</sup> See note 1 of Appendix, supra, concerning a model protective order.

5. Challenge to privilege designation. If, on inspection of the records, defense counsel believes that any record or portions thereof is in fact not privileged, then in lieu of or in addition to a motion to disclose or introduce at trial, see paragraphs 6 and 7, infra, counsel may file a motion to release specified records or portions thereof from the terms of the protective order. Counsel shall provide notice of the motion to all parties. Prior to the hearing, counsel for the Commonwealth shall be permitted to review such records in order to respond to the motion, subject to signing and filing a protective order as provided in paragraph 4 (b) of Appendix, supra. If a judge determines that any record or portion thereof is not privileged, the records shall be released from the terms of the protective order and may be inspected and copied as provided in paragraph 4 (a) of Appendix, supra. See also note 5 of Appendix, supra.

6. Disclosure of presumptively privileged records. (a) If defense counsel who obtained the summons believes that the copying or disclosure of some or all of any presumptively privileged record to other persons (for example, the defendant, an investigator, an expert) is necessary to prepare the case for trial, counsel shall file a motion to modify the protective order to permit copying or disclosure to specifically named individuals of particular records. The motion shall be accompanied by an affidavit explaining with specificity the reason why copying or



disclosure is necessary; the motion and the affidavit shall not disclose the content of any presumptively privileged record. Counsel shall provide notice of the motion to all parties.

(b) Following a hearing, and in camera inspection of the records by the judge where necessary, a judge may allow the motion only on making oral or written findings that the copying or disclosure is necessary for the defendant to prepare adequately for trial. The judge shall consider alternatives to full disclosure, including agreed to stipulations or disclosure of redacted portions of the records. Before disclosure is made to any person specifically authorized by the judge, that person shall sign a copy of the court order authorizing disclosure.<sup>9</sup> This court order shall clearly state that a violation of its terms shall be punishable as criminal contempt.

(c) All copies of any documents covered by a protective order shall be returned to the court on resolution of the case, i.e., on a change of plea or at the conclusion of any direct appeal following a trial or dismissal of the case.

7. Use of presumptively privileged records at trial. (a) A defendant seeking to introduce at trial some or all of any presumptively privileged record shall file a motion in limine at or before any final pretrial conference.

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<sup>9</sup> See note 1 of Appendix, supra, for information concerning a model order for use when permitting persons other than defense counsel access to presumptively privileged records.

(b) Counsel for the Commonwealth shall be permitted to review enough of the presumptively privileged records to be able adequately to respond to the motion in limine, subject to signing and filing a protective order as provided in paragraph 4 (b) of Appendix, supra.

(c) The judge may allow the motion only on making oral or written findings that introduction at trial of a presumptively privileged record is necessary for the moving defendant to obtain a fair trial. Before permitting the introduction in evidence of such records, the judge shall consider alternatives to introduction, including an agreed to stipulation or introduction of redacted portions of the records.

8. Preservation of records for appeal. Records produced in response to a rule 17 (a) (2) summons shall be retained by the clerk of court until the conclusion of any direct appeal following a trial or dismissal of a case.

**COMMONWEALTH'S NOTICE ACCOMPANYING SUMMONS TO RECORD HOLDER AND THIRD-PARTY  
SUBJECT OF HEARING ON DEFENDANT'S MOTION UNDER RULE 17 (a) (2) OF THE  
MASSACHUSETTS RULES OF CRIMINAL PROCEDURE, 378 MASS. 885 (1979)**

*[Insert case caption]*

*[USE A SEPARATE FORM FOR EACH KEEPER OF RECORDS AND EACH THIRD-PARTY SUBJECT  
NAMED IN DEFENDANT'S RULE 17 (a) (2) MOTION.]*

To: \_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address)

This notice is sent to you to inform you that the defendant in the above-captioned criminal case has filed a motion pursuant to Mass. R. Crim. P. 17 (a) (2) to be allowed to inspect the records of \_\_\_\_\_

(third-party subject) for the dates from \_\_\_ to \_\_\_\_\_ by \_\_\_\_\_

\_\_\_\_\_ (name and professional title of  
caregiver, if known), which are being held by \_\_\_\_\_

\_\_\_\_\_ (name and address  
of keeper of records). A hearing on this motion has been scheduled for  
(date and time) \_\_\_\_\_ in Courtroom \_\_\_\_\_ of the \_\_\_\_\_  
Courthouse located at \_\_\_\_\_.

You have the right to attend and be heard at the hearing. You may obtain counsel to represent you at the hearing. If you are a victim in this case, (see G. L. c. 258B, § 3), you have the right to confer with the prosecutor prior to this hearing. Your absence from the hearing shall not lead to its postponement.

Under the law, certain records may be considered "privileged." If the records listed above are privileged under the law, the Court will assume that you do not wish to waive any privilege at this time, unless you do so in writing before or at the scheduled hearing. Your absence from the hearing shall not constitute a waiver of any privilege you may have under the law.

If the motion is allowed, privileged records will be made available to defense counsel only, pending any further order of the Court.

DATE: \_\_\_\_\_

SIGNATURE OF ASSISTANT DISTRICT ATTORNEY \_\_\_\_\_

PRINTED NAME AND ADDRESS \_\_\_\_\_.

**NOTICE ACCOMPANYING SUMMONS TO KEEPER OF RECORDS**

*[USE THIS FORM FOR RECORDS NOT PRESUMPTIVELY PRIVILEGED OR RECORDS  
PRESUMPTIVELY PRIVILEGED WHERE THIRD-PARTY SUBJECT HAS WAIVED  
ANY APPLICABLE PRIVILEGE]*

*[Insert case caption]*

Pursuant to Rule 17 (a) (2) of the Massachusetts Rule of Criminal Procedure, 378 Mass. 885 (1979), the Court has issued the enclosed summons to produce records in the above-captioned criminal matter. The records ordered produced are not likely to be protected by a statutory privilege, or the third-party subject has waived any applicable statutory privilege.

The records ordered by the Court must be delivered to \_\_\_\_\_ (address of Clerk of Court) on or before the return date on the summons in a sealed envelope or box marked on the exterior with the name and docket number of the case, the name of the keeper of records, and the date on which the records are delivered to the office of the Clerk.

<b>NOTICE ACCOMPANYING SUMMONS TO KEEPER OF RECORDS</b>
<i>[USE THIS FORM FOR PRESUMPTIVELY PRIVILEGED RECORDS]</i>
<i>[Insert case caption]</i>
<p>Pursuant to Rule 17 (a) (2) of the Massachusetts Rule of Criminal Procedure, 378 Mass. 885 (1979), the Court has issued the enclosed summons to produce records in the above-captioned criminal matter. A judge has determined that the records ordered to be produced are "presumptively privileged," which means they may be protected by a statutory privilege.</p> <p>The records ordered by the Court must be delivered to _____ (address, Clerk of Court) on or before the return date on the summons in a sealed envelope or box clearly marked PRIVILEGED on the exterior. The envelope or box must also be marked on the exterior with the name and docket number of the case, the name of the keeper of records, and the date on which the records are delivered to the Court.</p> <p>Records designated as privileged shall be made available by the Clerk only to summoning defense counsel on execution of a protective order prohibiting all further disclosure of the records unless and until an application to and an order of the Court.</p>

**PROTECTIVE ORDER FOR DEFENSE COUNSEL**

[Insert case caption]

On consideration of the defendant's motion pursuant to Rule 17 (a) (2) of the Massachusetts Rules of Criminal Procedure, 378 Mass. 885 (1979), it is hereby ORDERED that defense counsel who has signed this protective order and filed it with the Clerk of Court in the above-captioned case be provided access to presumptively privileged records subject to the following terms and conditions.

1. Defense counsel only shall have access to presumptively privileged records solely in his or her capacity as an officer of the Court. Counsel shall review any presumptively privileged records in the Clerk's office, or a space within the courthouse designated by the Clerk, during regular business hours under arrangements to be made with the Clerk.
2. Counsel shall not copy, and shall not directly or indirectly disclose, disseminate or otherwise make available to any person, including the defendant, any of the presumptively privileged records, any portion thereof, or any of their contents without prior application to and an order of the Court.
3. Defense counsel may read and make notes concerning the presumptively privileged records. Any such notes shall be governed by this Protective Order.
4. Presumptively privileged records reviewed pursuant to this Protective Order shall not be used for any purpose other than the defense of the above-captioned case.
5. If defense counsel believes that copying or disclosure of any presumptively privileged records, or portions thereof, is necessary to prepare this case for trial, he or she may file a motion to modify this Protective Order to permit copying of records or disclosure to specifically identified individuals. The motion shall be accompanied by an affidavit, and notice shall be provided to all parties. If the Court enters an order vacating or modifying any term of this Protective Order, counsel shall then be bound by the terms of that Court order.
6. At the conclusion of trial or other disposition of the above-captioned case, the signatory shall deliver to the Clerk of Court, under seal, any and all copies of any records produced pursuant to any modified protective order or any other order of the Court. Notwithstanding the entry of any order terminating the case, this Protective Order shall remain in effect unless terminated by entry of a Court order.

**The Court and any counsel shall report any violation of this order to the Board of Bar Overseers.** Violations may also be reported to the Court and/or Board of Bar Overseers by the privilege holder, the keeper of records, and any other person who believes, in good faith, that the terms of this Order have been violated.

DATE: \_\_\_\_\_

SIGNATURE OF JUSTICE: \_\_\_\_\_

PRINT NAME OF JUSTICE: \_\_\_\_\_

**PROTECTIVE ORDER FOR DEFENSE COUNSEL (Cont'd)**

**CERTIFICATION BY COUNSEL**

I agree to be bound by the terms of this Protective Order.

SIGNED UNDER THE PENALTIES OF PERJURY.

\_\_\_\_\_ (DATE) \_\_\_\_\_ (SIGNATURE)

\_\_\_\_\_ (NAME)

\_\_\_\_\_ (ADDRESS)

\_\_\_\_\_ (BBO NUMBER)

**ORDER ALLOWING ACCESS TO PRIVILEGED DOCUMENTS BY PERSONS OTHER  
THAN DEFENSE COUNSEL**

[INSERT CASE CAPTION]

**ORDER**

On consideration of the defendant's motion to disclose records, it is hereby ORDERED that \_\_\_\_\_ (name, address, title of person permitted access to privileged records) is permitted access to the following records of \_\_\_\_\_ (name of third-party subject) \_\_\_\_\_ (designate records) for the period from \_\_\_\_\_ to \_\_\_\_\_, subject to the following terms and conditions.

1. Any person granted access to records ("authorized person") by this Court must sign and file a copy of this Order with the Clerk of Court in the above-captioned case before receiving access to the records.
2. An authorized person shall have access to records solely for use in the defense of the above-captioned case. An authorized person shall not copy or directly or indirectly disclose, disseminate or otherwise make available to any person, including the defendant, any portion of the records or their contents without a written Court order authorizing such copying or disclosure.
3. An authorized person may take notes regarding the records. Any such notes shall be governed by the terms of paragraph 2, above.
4. At the conclusion of any trial or other disposition of the above-captioned case, an authorized person shall deliver to the defense attorney any copies of any records and any notes made pursuant to paragraph 3, above. Notwithstanding the entry of any order terminating the case, this Order shall remain in effect unless terminated by the Court.

DATE: \_\_\_\_\_

SIGNATURE OF JUSTICE: \_\_\_\_\_

PRINT NAME OF JUSTICE: \_\_\_\_\_

**CERTIFICATION BY AUTHORIZED PERSON**

I agree to be bound by the terms of this Court Order. **I UNDERSTAND THAT VIOLATION OF THIS COURT ORDER IS PUNISHABLE AS CRIMINAL CONTEMPT, AND MAY SUBJECT THE VIOLATOR TO A FINE AND/OR TERM OF IMPRISONMENT.**

SIGNED UNDER THE PENALTIES OF PERJURY.

\_\_\_\_\_  
(DATE) \_\_\_\_\_ (SIGNATURE)  
\_\_\_\_\_  
(NAME)  
\_\_\_\_\_  
(ADDRESS)